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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1471

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

NEW JERSEY STATE LOTTERY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Counter-Statement of Questions Presented

1. Should the lottery provision of the Federal Communications Act (18 U.S.C. § 1304) be construed to prohibit news broadcasters from informing their listeners of

the winning numbers in a legal state lottery, even though the purpose of Congress in enacting the section was solely to prevent the advertisement or conduct of illegal lotteries through the airwaves?

2. Is an outright prohibition upon the broadcast as part of a regular news show of the winning numbers in a legal state lottery compatible with the free speech and free press guarantees of the First Amendment, in the absence of any indication that a public purpose is served by the prohibition?

Counter-Statement of the Case

On February 18, 1971, Jersey Cape Broadcasting Corporation (hereinafter "Jersey Cape"), the licensee of Stations WCMC-AM-FM-TV, Wildwood, New Jersey, filed a request with the Federal Communications Commission for a declaratory ruling on whether proposed broadcasts of the winning number in the New Jersey State Lottery would violate 18 U.S.C. § 1304, which prohibits the broadcasting of "any advertisement of or information concerning any lottery . . ." (App. 6-8). In a declaratory ruling issued July 14, 1971, the FCC held that the proposed broadcast would constitute a violation of 18 U.S.C. § 1304. 36 Fed. Reg. 13813 (1971) (App. 8-11).

The New Jersey State Lottery Commission then petitioned the FCC for reconsideration of its declaratory ruling on the ground that the Lottery Commission was adversely affected by the ruling within the meaning of 47 U.S.C. § 405 (App. 13-14). In a Memorandum Opinion and Order released July 27, 1972, the FCC adhered to its original interpretation of 18 U.S.C. § 1304 and denied the Lottery Commission's petition for reconsideration of the declaratory ruling (Pet. App. 12a to 26a).

On September 25, 1972, the Lottery Commission filed a petition for review of the order with the Court of Appeals for the Third Circuit which, on its own motion, submitted the appeal for determination en banc. In a unanimous opinion rendered on January 2, 1974, the court reversed the declaratory ruling of the FCC (Pet. App. 1a-10a) and held that ". . . [t]he announcements here involved are unadulterated broadcast journalism—news—and clearly are protected by 47 U.S.C. § 326 and the first amendment rather than prohibited by 18 U.S.C. § 1304." (Pet. App. 9a-10a).

The FCC petitioned for a writ of certiorari to review the Third Circuit's decision and, due to continuing uncertainties concerning the FCC's enforcement policies under Section 1304, the State of New Jersey also took the position that certiorari should be granted. On May 28, 1974 the Court granted the petition (App. 15).

At the general election held November 4, 1969, the voters of the State of New Jersey approved the adoption of an amendment to Article IV, Section VII, paragraph 2 of the New Jersey Constitution, adding subparagraph "C", as follows:

> "C. It shall be lawful for the Legislature to authorize the conduct of State lotteries restricted to the selling of rights to participate therein and the awarding of prizes by drawings when the entire net proceeds of any such lottery shall be for State institutions, State aid for education."

Subsequently, the "State Lottery Law," (N.J.S.A. 5:9-1, *et seq.*) was enacted by the New Jersey Legislature on February 16, 1970 to implement the constitutional amendment and the conduct of the New Jersey Lottery was commenced shortly thereafter.

In its original request to the FCC for a declaratory ruling Jersey Cape Broadcasting Corporation proposed the following program of broadcasting winning numbers in the New Jersey Lottery:

> "On Thursday morning, each week, a representative of the state of New Jersey draws one multi-digited number as the winning lottery number for the week. The person having the exact number wins the grand prize; other persons having some of the digits win lesser prizes. Approximately 11:30 A.M. each Thursday Stations WCMC-AM-FM-TV are advised of the winning number via its Associated Press Teletype machine.
>
> "It has become known to area residents that the station does become aware of the winning number shortly after it is drawn, and, each Thursday the station is bombarded with scores of telephone calls by residents requesting the winning number. The licensee understands that area newspapers and state agencies are bombarded with telephone inquiries, also. All have attempted to discourage such calls. The newspapers in the area publish the winning number, but not until late afternoon or the next morning.
>
> "It is proposed that Station WCMC-AM-FM-TV be permitted during regular newscasts to broadcast the following statement:
>
> 'The winning state lottery number drawn today is (and then recite the winning number).'
>
> There would be no further comment whatever either during that newscast or thereafter. It is proposed that the station broadcast the winning number on three consecutive newscasts commencing at 12:00 noon on Thursday, only." (App. 7).

In its petition for reconsideration of the FCC's adverse ruling the New Jersey Lottery Commission brought to the attention of the agency certain additional facts concerning the extent of public interest in receiving information about the lottery, summarized in the opinion of the Third Circuit:

> "The Lottery Commission claims that each Thursday it is confronted with a difficult problem in coping with the public demand for information of the winning number. Its telephone service was temporarily suspended on August 19, 1971, due to an overload of telephone calls. Records of the New Jersey Bell Telephone Company indicate that its twelve automatic answering and announcement machines in Newark, specially installed for the Lottery Commission to announce the winning numbers to callers in the northern half of New Jersey, receive an average of 5,500 calls between the hours of 9:30 a.m. and 2:30 p.m. on Thursdays. Five additional machines have been installed in Newark. In addition to the calls completed, 32,000 and 63,000 'overflow calls were attempted on August 12 and August 19, 1971, respectively. Many phone calls requesting the winning lottery number have also been made to newspapers throughout the state commencing at approximately 11:30 a.m. on Thursdays. On a typical Thursday, 2,750,000 ticketholders are interested in the winning number." (Pet. App. 3a-4a).

Summary of Argument

The legislative history of the Federal Communications Act of 1934 indicates that the lottery section (18 U.S.C. § 1304) was designed to prevent the airwaves from being used to advertise or to conduct lotteries which had been declared illegal by state law. Since there were no legal state lotteries in the 1930s, Congress could not have intended to prohibit the broadcast news media from announcing winning numbers in a legal state lottery in response to widespread public demand for that information. The fact that the lottery section provides criminal sanctions for violations and thus must be strictly construed further militates against interpreting it to apply to broadcasts which were beyond the contemplation of the Congress which enacted the law. Finally, if the lottery provision could be read to restrict the discretion of the broadcast news media in selecting material for regular news shows, it would infringe upon the free speech and free press guarantees of the First Amendment. Therefore, the lottery provision should be construed to apply solely to the commercial activity towards which it was directed at the time of enactment.

ARGUMENT

POINT I

The lottery provision of the Federal Communications Act (18 U.S.C. § 1304) was designed to prevent the advertisement or actual conduct of illegal lotteries through the airwaves, and therefore should not be construed to prohibit the broadcasting on a regular news show of winning numbers in a legal state lottery.

The initial issue on this appeal is whether the FCC has correctly construed 18 U.S.C. § 1304, enacted as part of the Communications Act of 1934 (48 Stat., ch. 652), as prohibiting the broadcast news media from announcing winning lottery numbers during regular news shows.

The provision eventually enacted as Section 1304 first appeared as House Bill 7716 of 1932. Designed to amend and supplement the Radio Act of 1927, this bill, including the lottery broadcast provision, passed both Houses of the 72nd Congress, but was pocket vetoed by the President and therefore never became law. The same section was included in Senate Bill 3285 of the 73rd Congress, which became the Federal Communications Act of 1934. Perhaps because the lottery provision was not new at the time of consideration of S 3285, there was no significant mention of it in the debates preceding the adoption of the Federal Communications Act. Rather, the only enlightening discussion of the intent of the section occurred during the deliberations on H.R. No. 7716 two years earlier.

The House debates on H.R. No. 7716 indicated that the essential purpose of the lottery provision was to prohibit either the advertisement or actual conduct of a lottery via the airwaves. Thus, Congressman Edwin F. Davis, the

sponsor of the bill, stated that the section ". . . forbids, in effect, conducting lotteries over radio stations. In other words, this section simply provides that the federal government, which has assumed the responsibility and obligation to regulate radio, shall not permit these stations, licensed by the Federal Government, to violate the laws of the United States and of every State in the Union." 75 Cong. Rec. 3683 (1932). Similarly, Congressman Lehlbach, who played a key role in the deliberations on the bill and later served on the Senate-House conference committee to reconcile differences in language with the Senate Bill, stated that the section ". . . prohibits the broadcasting or advertising of lotteries, to which the radio interests give their unqualified consent; and it is not in the sense of censorship that this provision is sought but because it is unfair, grossly unfair, to permit, in the event they should avail themselves of the absence of a prohibition, radio to advertise a lottery when, if a newspaper attempts to do the same thing, it is unmailable." 75 Cong. Rec. 3684 (1932).

When the bill reached the Senate, the Committee on Interstate Commerce changed the lottery provision to proscribe any "advertisement" instead of any "information concerning" a lottery. 76 Cong. Rec. 3767 (1933). The Committee report explained the change in language as follows:

> "The purpose of this new section is identical with the section passed by the House, but your committee believes the language of the new section more nearly places radio stations on the same basis as newspapers in connection with broadcasting information as to lotteries." Sen. Rep. No. 564, 72nd Cong., 1st Sess. (1932).

It thus appears that the Senate Committee changed the language of the lottery provision, not to narrow its scope

as asserted by the FCC, but rather as a technical revision to bring its language into conformity with that part of 18 U.S.C. § 1302 which prohibits the knowing use of the mail to send a newspaper containing "any advertisement" of a lottery. 76 Cong. Rec. 3764 (1933) (comments of Senator Dill).

The Senate Committee also changed the language of numerous other provisions of H.R. No. 7716 and, after the bill had been passed by the Senate, the House declined to acquiesce in the Senate amendments and asked for a conference. However, there is absolutely no indication in the legislative record that the difference in phraseology in the Senate and House versions of the lottery provision prompted the two Houses to ask for a conference. Therefore, the implication in the FCC's brief that a conference was called on H.R. No. 7716 because the members of the House thought the Senate version of the lottery provision to be significantly narrower than the House version is simply unfounded. On the contrary, the report of the House conference committee stated that "the amendment agreed upon is substantially the same as section 13 of the bill, involving some changes in phraseology." 76 Cong. Rec. 5037 (1933).

The above cited portions of the congressional debate clearly show that Congress neither discerned nor intended to draw a sharp distinction between proscriptions against "information concerning" and "advertisement of" any lottery. Although the representatives originally used the term "information", the debate indicates that the House's real concern was the prevention of the advertisement or conducting of a lottery over the air. The Senate amended the bill to say "advertisement" just to make that intention more explicit. The most likely explanation for the conference committee employing the disjunction, "advertisement of or other information concerning" a lottery, is that this

was the simplest way of reconciling the Senate and House versions of the lottery provision, which was neither a particularly controversial nor an important part of the bill. Therefore, the legislative history of the predecessor to the bill which became the Federal Communications Act of 1934 does not support the conclusion that the term "information concerning" a lottery was conceived to be significantly broader than a prohibition against advertising.

In the absence of legislative history to support the FCC's expansive interpretation of Section 1304, the Court should seek the intent of Congress in light of established principles of statutory interpretation.

It is firmly established that the intent of legislation is to be gathered from the nature of the subject matter and the overall object and policy of the statute. *Richards* v. *United States,* 369 U.S. 1, 11 (1962). It must be borne in mind that the subject of this case is a news broadcast concerning a legal state lottery, rather than the use of the airwaves to conduct an illegal lottery. It is true, as pointed out in the brief for the FCC, that the legislative history of 18 U.S.C. § 1302 seems to indicate that it was intended to apply to legal state lotteries, and that Section 1304 was patterned after Section 1302. However, the issue here is not whether legal state lotteries come within Section 1304. Rather, the point is that the evil at which Section 1304 was directed was illegal lotteries, and that the existence of legal state lotteries, which would be the focus of sufficiently widespread public interest to be the subject of news broadcasts, was simply not within Congress' contemplation. Indeed, if there had been any intimation that the section was intended to affect the freedom of broadcasters to determine what is news, rather than simply to prohibit the use of the airwaves to advertise or conduct lotteries which were already illegal under state law, one may be quite sure that the inclusion of this provision in the Communications

Act would have been bitterly opposed by broadcasters, instead of receiving their support. The FCC's efforts to regulate news broadcasting under its interpretation of Section 1304 thus extends the application of this section into an area which was obviously beyond the contemplation of Congress in the 1930s.

The FCC's position has also been developed without proper regard for the well established principle that penal statutes are to be strictly construed. *United States* v. *Bass,* 404 U. S. 336, 348 (1971); *Federal Commun. Com'n* v. *American Broad. Co.,* 347 U. S. 284, 296 (1954); *United States* v. *Halseth,* 342 U. S. 277, 280 (1952); *France* v. *United States,* 164 U. S. 676, 682-683 (1897). Although this case arises in the setting of the FCC's exercise of its regulatory responsibilities, violation of 18 U.S.C. § 1304 is a crime, punishable by a fine of not more than $1,000 and imprisonment of not more than one year, with each day's broadcasting constituting a separate offense. Therefore, the provision should be interpreted to avoid establishing criminal responsibility for conduct when there is absolutely no indication Congress considered that conduct to be criminal. Indeed, the Court has already followed precisely this approach in rejecting the FCC's view that Section 1304 prohibits television "give away" shows. *Federal Commun. Com'n* v. *American Broad. Co., supra.* As the Court properly noted in *United States* v. *Bass, supra*:

> "'[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' . . . In various ways over the years, we have stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" • • • [B]e-

> cause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.' H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967)." 404 U. S. at 347-348.

This is a particularly appropriate setting for invoking this policy. It is clear that Section 1304 was intended to prevent the use of the airwaves as an instrumentality for conducting or assisting in conducting lotteries already illegal under state law. However, nothing could have been further from the minds of the members of Congress at the time than subjecting the broadcast news media to possible incarceration and fines for informing the public of the results of legal state lotteries. Therefore, the Court should await a "clear and definite" expression from Congress that such conduct in fact has the "moral condemnation of the community" before subjecting the broadcast news media to the criminal sanctions of Section 1304. Cf. *Federal Commun. Com'n* v. *American Broad. Co., supra.*

Finally, as discussed in greater detail in Point II of this brief, the FCC's expansive interpretation of Section 1304 is inconsistent with the free press and free speech guarantees of the First Amendment. Accordingly, Section 1304 should be construed so as to avoid these substantial constitutional problems. *International Association of Machinists* v. *Street,* 367 U. S. 740, 749-750 (1961). In addition, Congress included an express provision in the Communications Act directing the FCC to respect First Amendment values. 47 U.S.C. § 326. Therefore,

without resolving the question whether 47 U.S.C. § 326 was intended to provide broader protection than the First Amendment, this section at a minimum evidences a congressional intent that the FCC interpret its enabling legislation to avoid conflicts with the First Amendment rights of broadcasters and their listeners. Nevertheless, the FCC has disregarded the congressional admonition in 47 U.S.C. § 326 by giving Section 1304 an expansive interpretation which has the effect of censoring radio and television news stories concerning a matter of general public interest.

The brief submitted on behalf of the FCC, however, ignores the context in which Section 1304 was enacted, the fact that it is a penal statute which must be strictly construed and the First Amendment problems which its expansive interpretation raises, and flatly relies on a straightforward literal reading of Section 1304 (Brief for the FCC, p. 12). However, "[t]he decisions of this Court have repeatedly warned against the dangers of an approach which confines itself to the bare words of a statute." *Lynch* v. *Overholser, Hospital Superintendent,* 369 U. S. 705, 710 (1962). This warning is clearly appropriate in construing Section 1304 since, as noted by the court in *New York State Broadcasters Ass'n* v. *United States,* 414 F. 2d 990, 997 (2nd Cir. 1969), cert. denied 396 U. S. 1061 (1970), a literal interpretation of "information concerning" a lottery ". . . could include, for example, an editorial for or against continuing the lottery experiment started by New York State in 1967," which would be clearly violative of the First Amendment.

Equally important, as the court also noted in the *New York State Broadcasters* case, ". . . the words of section 1304 were patterned after the language of the mail statute which had long been narrowly construed." 414 F. 2d at 997. In *Commerford* v. *Thompson,* 1 Fed. 417 (C. C.

Ky. 1880), the court held that a letter transmitting money to a lottery company was not a "letter concerning a lottery" within the meaning of the predecessor of Section 1302. The court said:

> "It is obvious that this word ['concerning'] was not intended to be used in its broadest sense, 'pertaining to or relative to,' as such construction would include every letter of which the enterprises mentioned in the section were wholly or in part the subject, comprising not only letters written in the interest of these enterprises, but letters of inquiry, letters seeking legal advice, letters written for the purpose of suppressing their business, and even the correspondence carried on between the defendant and the general post-office in this case. This certainly was not the intention of congress.
>
> "The word 'circular,' we think, affords a clew to the meaning of this section. *This word obviously refers to circulars sent out by lottery companies for the purpose of advertising their schemes, and the word 'letter' used in connection with it, under the rule of 'ejusdem generis,' imports letters of a similar character and mailed for a like purpose.*" 1 Fed. at 420 (Emphasis added).

Similarly, in *United States* v. *Mason*, 22 F. 707 (C. C., E. D. Va. 1884), the court found that Section 1302 had not been violated by sending a letter to a lottery dealer ordering tickets, saying:

> "It is very plain that the broad, literal terms of this statute are to be restricted in some manner. It declares that the mailing of any letter concerning a lottery shall be punishable; so that a father writing his son, warning him against spending money upon tickets in any specified lotteries, would be indictable for a criminal offense. That cannot be the meaning of the statute. It must be construed, not according to its literal terms, but with reference to the evil to which congress was addressing itself, and the remedy it intended to provide for the suppression of that evil. The phrase employed by congress is, '*letter* or *circular* concering a lottery.' The two terms are used synonymously as to the person mailing the things referred to. A letter is indited to a particular person; a circular is intended for a number of persons. Whoever was in the mind of congress as mailing the circular, was in its mind as mailing the letter." 22 F. 2d at 707.

Obviously, it would be inappropriate to interpret the words "information concerning" in Section 1304 literally to prohibit any broadcast communication pertaining to lotteries, just as the courts in *Commerford* and *Mason* refused to interpret "letter concerning" in Section 1302 to refer to any communication through the mails pertaining to a lottery; otherwise, even an editorial condemning lotteries or a human interest story concerning a winner would be barred. Rather, the words "information concerning" should be read in light of its association with "advertisement" just as "letter concerning" was read in light of "circular" in the *Commerford* and *Mason* cases.

The clearest indication of the pointlessness of a literal interpretation of Section 1304 is the fact that the FCC itself has not been faithful to this approach, but rather has issued a declaratory ruling containing a detailed listing of the types of information concerning a lottery which it deems to fall within the prohibition. The FCC's ostensible test for determining which items are prohibited by Section 1304 is whether the information they provide "directly

promotes" a lottery. *Cf. New York State Broadcasters Ass'n* v. *United States, supra.* The ellusiveness of this test is well illustrated by comparing the types of broadcasts which the FCC has concluded are prohibited by Section 1304 with those which it says are not. For example, the FCC has decreed that the live broadcast of the drawing of a winning lottery ticket by a prominent actress or a government official would be prohibited by Section 1304, whereas interviews with persons holding winning lottery tickets, relating to the number of tickets they purchased, their expectation of winning a prize, their reaction upon learning that they held winning tickets, and what they intend to do with the prize money, would be permissible. *In the Matter of Broadcasting of Information On Lotteries* (Supplemental Declaratory Ruling) 21 F.C.C. 2d 846 (adopted February 26, 1970). It is impossible to resist the conclusion, after reviewing these fine distinctions drawn by the FCC, that the agency has not given Section 1304 even the literal interpretation espoused in its own brief. Rather, in the guise of interpretation, it has simply adopted its own version of a lottery prohibition. However, the FCC plainly lacks the authority to pursue its own present conceptions of the public policies which should govern the media by giving Section 1304 a scope far broader than that fairly intended by Congress at the time it was enacted.

The present case is a peculiarly inappropriate one for the court to defer in any respect to the policies of the executive branch, for not only are basic First Amendment values implicated but the value judgments which underlie the FCC's policy are directly contrary to those expressed in the lottery-enabling constitutional provisions and legislation of the State of New Jersey and a majority of the states in the Northeast. Therefore, as the Court stated in holding that the FCC had erroneously construed Section 1304 to prohibit television give-away shows, "[r]egardless

of the doubts held by the Commission and others as to the social value of the programs here under consideration, such administrative expansion of §1304 does not provide the remedy." *Federal Commun. Com'n* v. *American Broad. Co., supra* at 297.

POINT II

Insofar as the lottery provision is construed by the Federal Communications Commission to restrain the broadcasting of news regarding the New Jersey lottery, it improperly inhibits the right of the Lottery Commission and broadcasters to send and the right of the public to receive information through radio and television and thereby violates the First Amendment to the United States Constitution.

"There is little need to reiterate that the freedoms of speech and of the press rank among our most cherished liberties." *Pittsburgh Press Co.* v. *Human Relations Comm.*, 413 U.S. 376, 381 (1973). It is also clear that television and radio are "press" for purposes of determining the constitutionality of government regulation. *Columbia Broadcasting* v. *Democratic Comm.*, 412 U.S. 94 (1973). Furthermore, except to the extent that the scarcity of radio and television frequencies imposes an obligation on broadcast licensees to permit others to use broadcast facilities to express their views (*Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969)) or that the captive nature of the broadcast audience requires protection of listeners from offensive material (*Columbia Broadcasting* v. *Democratic Comm., supra* at 127-128), there is no distinction between electronic and other means of communication in the breadth of the protections conferred upon the press by the First Amendment:

> "Radio and television were, of course, unknown media when freedom of the press was written into the Bill of Rights, but no rational distinction can be made between radio and television on the one hand and the press on the other in affording the constitutional protection contemplated by the First Amendment . . . ." *Rosenbloom* v. *Metromedia, Inc.*, 415 F. 2d 892, 895 (3rd Cir. 1969), *aff'd* 403 U.S. 29 (1971).

The First Amendment protection of free speech embraces the right to hear. Thus, the Court found that an enactment requiring the Postmaster General to detain Communist political propaganda and to deliver it only upon the addressee's request was an unconstitutional infringement upon the addressee's right to receive information. *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). The right to receive information has been given special recognition in the context of radio and television broadcasting in *Red Lion Broadcasting Co.* v. *F.C.C.*, *supra*:

> ". . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the F.C.C." 395 U.S. at 390.

It is also now well established that the protections of the First Amendment are not restricted to political discourse. As stated by the Court in *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967): "the guarantees for speech and press are not the preserve of political expression or comment upon public affairs." Indeed, one of the principles which underlies the First Amendment is that it is beyond the province of government to tell its citizens what is "significant" or "worthwhile" for them to hear and see. The Court appropriately noted in *Winters* v. *New York*, 333 U.S. 507, 510 (1948):

> "The line between the informing and the entertaining is too elusive for the protection of that basic right . . . . What is one man's amusement teaches another's doctrine."

A similar view was expressed by the District Court in the context of broadcasting in *Federal Commun. Comm'n* v. *American Broad. Co.*, 110 F. Supp. 374 (S.D. N.Y. 1953), *aff'd* 347 U.S. 284 (1954), in rejecting the FCC's attempt to invoke Section 1304 to enjoin television "give-away" shows:

> "The merits of the 'give-away' programs are not an issue in this case. They appear to be a source of amusement for many thousands of people. Even if it could be said that 'we can see nothing of any possible value to society' in these programs, 'they are as much entitled to the protection of free speech as the best of literature or music.'" 110 F. Supp. at 389.

The full reach of the constitutional protection extended to news broadcasting was perhaps best expressed in *Jenkins* v. *Dell Publishing Co.*, 251 F.2d 447 (3rd Cir. 1958), *cert. den.* 357 U.S. 921 (1958) where the court said:

> "In the verbal and graphic publication of news, it is clear that information and entertainment are not mutually exclusive categories. A large part of the matter which appears in newspapers and news magazines today is not published or read for the value

or importance of the information it conveys. Some readers are attracted by shocking news. Others are titillated by sex in the news. Still others are entertained by news which has an incongruous or ironic aspect. Much news is in various ways amusing and for that reason of special interest to many people. Few newspapers or news magazines would long survive if they did not publish a substantial amount of news on the basis of entertainment value of one kind or another. This may be a disturbing commentary upon our civilization, but it is nonetheless a realistic picture of society which courts shaping new juristic concepts must take into account. In brief, once the character of an item as news is established, it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication is privileged." 251 F.2d at 451.

There are only a few limited categories of communication which fall beyond the protective umbrella of the First Amendment. Among these are the various categories of communication which the Court has characterized as "fighting words" (*Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942)) obscenity (*Roth* v. *United States,* 354 U.S. 476 (1957)) and libel (*New York Times* v. *Sullivan,* 376 U.S. 254 (1964)). The Court has also held that speech in the commercial sphere (*Pittsburgh Press Company* v. *The Pittsburgh Commission on Human Relations, supra; Valentine* v. *Chrestensen,* 316 U.S. 52 (1942)) and the communication of ideas by conduct (*United States* v. *O'Brien,* 391 U.S. 367 (1968)), do not enjoy the same protection accorded other forms of speech.

It is clear, however, that the broadcasting of winning lottery numbers as part of a regular news show does

not fall within any of these recognized exceptions to the general protection of speech afforded by the First Amendment. The simple recitation of a winning lottery number is obviously not libelous or obscene. Nor is there any suggestion that communication concerning a legal state lottery may tend to invite a breach of the peace. Finally, it could not seriously be argued that news broadcasting falls within the parameters of the commercial speech doctrine or that the selection of material for a news show is to be judged by the tests which govern communication by conduct. It is not surprising, therefore, that the FCC does not rest its defense of the constitutionality of Section 1304 as construed by that agency on any recognized exception to the protections of the First Amendment.

Rather, the FCC seeks to fashion a new exception to the protections of the First Amendment by threading together several separate points which it discerns in existing case law: (1) that the First Amendment shields broadcasters more narrowly than others (Brief for the FCC, pp. 17-19); (2) that the Government could "suppress" lotteries entirely and therefore it has a lesser power ". . . to ban words, written or spoken, in furtherance of a lottery" (Brief for the FCC, p. 22); and (3) that the broadcast of a winning lottery number on a news show is not "news" but rather "an ingredient of the lottery operation" and therefore beyond the protection of the First Amendment (Brief for the FCC, p. 23). None of these points, either individually or collectively, is persuasive in the present context.

Although the Court has recognized that the broadcast media ". . . present an unusual order of First Amendment values," *Columbia Broadcasting* v. *Democratic Comm., supra,* 412 U.S. at 101, it has never said that the media and its viewers and listeners are entitled to

only a "watered down" version of First Amendment protections. Rather, where the Court has sustained restrictions on the journalistic freedom of broadcasters, it has done so to protect the constitutional and personal rights of viewers and listeners. In *Red Lion Broadcasting Co.* v. *F.C.C., supra,* the Court concluded that the scarcity of broadcast frequencies makes broadcasters public trustees of the airwaves and that where there is a conflict between the right of broadcasters to exercise unfettered control over what may be broadcast on their stations and the right of viewers to be exposed to the full gamut of ideas and experiences, "[i]t is the right of the viewers and listeners, not the right of broadcasters, which is paramount." 334 U.S. at 390. However, there is no issue in this case of the exclusion of anti-lottery views from the airwaves, so the scarcity of broadcast frequencies is irrelevant. The Court also has recognized that Congress and the FCC may take into account "[t]he 'captive' nature of the broadcast audience" by imposing restrictions upon commercial advertisements. *Columbia Broadcasting* v. *Democratic Comm., supra,* 412 U.S. at 127. It is in part this characteristic of the broadcast media, and particularly the difficulties it poses for parents in protecting their children from injurious influences, which was relied upon in sustaining the ban on the broadcast of cigarette advertisements in *Capital Broadcasting Co.* v. *Acting Attorney General,* 333 F. Supp. 582 (D. D. C. 1971), aff'd 405 U.S. 1000 (1972). But the recitation of a winning lottery number on a news broadcast has no adverse influence in any way comparable to the subliminal impact of cigarette commercials. Therefore, the FCC understandably has not attempted to support the constitutionality of its interpretation of Section 1304 by reliance on the "captive audience" doctrine.

The contention that since lotteries could be "suppressed", words in furtherance of them can be banned,

represents a curious ellipsis. In those limited contexts where the Court has sustained restrictions on freedom of communication, it has done so in the name of some overriding countervailing interest. See *e.g. Schenck* v. *United States,* 249 U.S. 47 (1919) (to prevent the obstruction of military subscription during wartime); *Dennis* v. *United States,* 341 U.S. 494 (1951) (to prevent overthrow of government by violent revolution); *Branzburg* v. *Hayes,* 408 U.S. 665 (1972) (to promote a full and fair fact finding process within the grand jury system); *Red Lion Broadcasting Co.* v. *F.C.C., supra* (to protect the right of the people as a whole to receive full range of communication in the marketplace of ideas); *Giboney* v. *Empire Storage & Ice Co.,* 336 U.S. 490 (1949) (to prohibit action in furtherance of agreements in restraint of trade). See also *Hiett* v. *United States,* 415 F. 2d 664 (5th Cir. 1969), *cert.* den. 397 U.S. 936 (1970). The strength of the interest required to support any restriction on freedom of communication has varied depending upon several factors, such as whether the subject of the communication has been legal or illegal (see *e.g. Pittsburgh Press Co., supra; Giboney* v. *Empire Storage Co., supra*), whether the communication has been in a commercial context (*Pittsburgh Press Co., supra*), and whether the speech has been coupled with action (*Grayned* v. *City of Rockford,* 408 U.S. 104 (1972)), but no case has sustained a restriction on communication without articulating some interest which would be furthered thereby.

Here, the subject of the communication is a legal state lottery, presented in the context of news broadcasting, and it cannot be said to have any discernible relationship with action. It would therefore require, under any view of the First Amendment, a particularly strong showing for a restriction on news broadcasts of winning state lottery numbers to be sustained.

One might have expected, before reading the briefs in this case, that the FCC would seek to defend its interpretation of Section 1304 by appealing to thread worn moralisms about the evils of gambling. However, it has artfully avoided this position by simply describing lotteries as "suppressible". It is easy to see why the FCC has refrained from urging that there is a public interest in the prevention of gambling which outweighs the First Amendment interests of the media and its listeners. Radio and television communications concerning gambling are pervasive. Sports broadcasters freely discuss the "point spreads" on each week's football games as well as the "winning combination" of numbers in the daily doubles at the local racetracks. Additionally, the sale of various consumer products is promoted on radio and television through advertisements of "give-away" contests in which winners are determined by chance. Most significantly, radio and television broadcast advertisements encouraging people to come to racetracks and to participate in off-track betting; and the FCC has not only declined to take action against such advertising, but has affirmatively acknowledged, by a declaratory ruling released April 3, 1973, that state-run off-track betting serves a legitimate state interest and therefore may be broadcast:

> ". . . While we remain convinced that virtually any inducement to bet may cater generally to the gambling spirit, we conclude now that our ruling paid insufficient attention to New York's legislative determination that legal off-track betting would serve public needs.
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> "12. When the New York legislature approved off-track betting, it determined that two public needs would be served; the raising of revenues and the suppression of illegal gambling. The legislature thus gave that activity a status similar to legalized on-track betting. We see no reason to revise our 1964 Policy Statement; however, we also are not in a position to go behind the legislature's judgment that off-track betting serves legitimate public needs in New York State. To accommodate both our established policy and the State's policy, we now conclude that appropriate advertisements in support of OTB should not be prohibited." *In the Matter of Broadcasting of Information Concerning Horse Races,* FCC 73-355 (released: April 3, 1973).

If the concern over the promotion of illegal gambling does not outweigh the legitimate public interests served by off-track betting, this conclusion should be even more evident with respect to a legal state lottery.* It is common knowledge that horse racing is the subject of illegal gambling operations, and that off-track betting information may potentially aid illegal gambling operations. There are no indications, however, that the results of legal state lotteries are being used for comparable purposes. Thus, the only adverse consideration which the FCC has deemed significant in connection with the broadcasting of horse-race results is absent here. Therefore, whatever arguments might be advanced in another social milieu that prevention of gambling outweighs the free speech guarantees of the First Amendment, it is manifest from the FCC's own enforcement policies that the public interest

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* Indeed, it might be argued that any congressional effort to prevent communications by broadcasters concerning a state lottery while permitting similar communications involving off-track betting is an "arbitrary and invidious" distinction violative of the equal protection guarantees of the Fifth Amendment. See *Dandridge* v. *Williams,* 397 U. S. 471 (1970).

in keeping communications concerning legal state gambling away from the American public is simply non-existent.*

Finally, the FCC's claim that the broadcasting of winning lottery numbers as part of regular news shows should not be viewed as "news," for First Amendment purposes, is untenable. Initially, it should be reemphasized that the protections of the First Amendment are not limited to comments upon public affairs or the "exchange of ideas" but rather extend to the full range of communications, including the trivial or the entertaining. *Time, Inc.* v. *Hill, supra; Winters* v. *New York, supra; Federal Commun. Com'n* v. *American Broad. Co., supra; Jenkins* v. *Dell Publishing, supra.* Therefore, a conclusion that the broadcast of winning lottery numbers as part of regular news shows is "news" is not a prerequisite for protection under the First Amendment. The most significant consideration in First Amendment terms is rather that the selection of a communication has been made by the editorial staff of the broadcaster. This sharply distinguishes the present case from *Capital Broadcasting* v. *Mitchell, supra,* where the court relied heavily upon the commercial speech doctrine in sustaining the validity of the congressional ban on cigarette advertising. Similarly, in affirming the prohibition against newspapers using illegal sex-designated columns for help wanted advertisements, the Court emphasized that its decision did not ". . . authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors." 413 U.S. at 391. Here, it is undisputed that there is an intense general public interest in New Jersey State Lottery, and that the broadcasting of winning numbers on news shows represents the response of the broadcaster, in the exercise of its editorial judgment, to meet this public demand. The protection of this communication from government regulation thus goes to the very essence of the rights of a free press which the First Amendment was designed to protect.

* The Congressional view of lotteries is also not without its ambiguities. Although 12 U.S.C. §25a prohibits banks from selling lottery tickets, they are allowed to continue distributing lottery tickets, receiving the proceeds of ticket sales, paying lottery prizes, keeping books and records for the Lottery Commissions of various states, and performing other services for state lotteries. Senate Rep. No. 727, 90th Cong., 1st Sess. (1967). Furthermore, the Excise Tax Reduction Act of 1965 (P.L. 89-44, §813, 79 Stat. 170), granted complete exemptions for state-operated lotteries from the $50 annual federal occupational tax on persons receiving wagers and from the ten percent federal excise tax on wagers. See *Marchetti* v. *United States,* 390 U. S. 39, 42 (1968).

In view of the superior interest of the states in the local moral fabric, the right of the public "to receive information and ideas, regardless of their social worth", (*Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969)) and the demonstrated democratic choice of the New Jersey voters in approving a constitutional amendment for the State-operated lottery, the elusive harmful effects of lotteries which the FCC has refrained from even discussing are too light to outweigh the First Amendment interests of broadcasters and listeners in the uncensored broadcasting of news about a subject of widespread public interest. Therefore, even if the Court could find an unmistakable congressional intention to prohibit the broadcasting of winning lottery numbers as part of regular news shows, such a law would violate the First Amendment guarantees of free speech and freedom of the press.

CONCLUSION

It is respectfully submitted for the foregoing reasons that the Court should affirm the judgment of the Third Circuit of the Court of Appeals, which reversed the declaratory ruling of the Federal Communications Commission that the broadcasting of winning numbers in a legal state lottery is prohibited by 18 U.S.C. § 1304.

Respectfully submitted,

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